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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1097

REYNOLDS METALS COMPANY, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reynolds Metals Company respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a-12a) is reported at 564 F.2d 663. The opinion of the district court (App. B, *infra,* pp. 13a-27a) is reported at 417 F.Supp. 365.

JURISDICTION

The judgment of the court of appeals was incorporated in its Opinion, and was entered on October 14,

1977. On October 27, 1977, a petition for rehearing was timely filed. On December 5, 1977, the court of appeals denied rehearing. App. C, *infra,* p. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Commission ("EEOC") and the Office of Federal Contract Compliance Programs ("OFCCP"), absent express or implied legislative or executive authorization, may cross-delegate distinct administrative, investigative and prosecutorial responsibilities and powers which have been separately vested in OFCCP by executive order or in EEOC by statute?

2. Whether OFCCP may agree to share with EEOC information which OFCCP acquires from government contractors, when this agreement bypasses congressionally and administratively imposed restrictions on EEOC information gathering and results in the acquisition by EEOC of information which it is not authorized to collect directly from the contractors?

3. Whether the public must be afforded prior notice and opportunity to comment under 5 U.S.C. § 553 if regulations proposed by an agency will have a substantial impact on the public?

STATUTES AND REGULATIONS

The relevant provisions of 5 U.S.C. § 553, 29 U.S.C. § 161, 42 U.S.C. §§ 2000e-8(a) and (c) and 2000e-9, Executive Order 11246, 41 C.F.R. §§ 61-1.21 through 60-1.24, and the Memorandum of Understanding (39 Fed. Reg. 35855) are set forth as Appendix D, *infra,* pp. 37a-54a.

STATEMENT OF THE CASE

1. As a government contractor, Reynolds Metals Company ("Petitioner") is required to comply with the equal employment opportunity requirements of Executive Order 11246 [1] and with various implementing regulations [2] which have been promulgated thereunder by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). These orders and regulations require Petitioner and other government contractors to take affirmative action to achieve equal opportunity in employment and to prepare annually, for each of their facilities, documents known as "affirmative action programs" ("AAP's"). 41 C.F.R. § 60-1.40. Pursuant to OFCCP's regulations, such AAP's must include highly detailed statistical analyses of the composition of the facility's workforce, critical self-analyses of the contractor's success or failure in taking affirmative action, candid admissions of where it has failed to comply with applicable standards, and self-imposed goals to implement affirmative action and to correct any deficiencies. 41 C.F.R. §§ 60-2.11 through 60-2.13.

Petitioner's AAP's are furnished to the Defense Supply Agency [3] during the course of reviews conducted

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[1] 30 Fed. Reg. 12313 (1965) as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974).

[2] 41 C.F.R. Chapter 60.

[3] Respondents are Harold Brown, Secretary of Defense; Lt. Gen. W. W. Vaughan, Commander of the Defense Logistics Agency (formerly, Defense Supply Agency) of the Department of Defense ("DSA"); F. Ray Marshall, Secretary of Labor; Weldon J. Rougeau, Director of OFCCP; and Eleanor Holmes Norton, Chair of the Equal Employment Opportunity Commission ("EEOC"). The Secretary of Labor is responsible for administering the equal

by DSA of Petitioner's facilities to determine whether Petitioner has complied with the Executive Orders and OFCCP's rules. 41 C.F.R. §§ 60-1.20, 60-1.40(c), 60-2.12(m). In furnishing its AAP's, Petitioner does so only for the limited purpose of demonstrating to DSA and OFCCP its compliance with the Executive Orders and OFCCP's rules. Petitioner's AAP's are not prepared for, or furnished to, any other government agency or person (including EEOC).

Petitioner and other government contractors who employ more than fifteen persons are also subject to the jurisdiction of the Equal Employment Opportunity Commission. Although the EEOC requires employers to file reports such as the EEO-1 report,[4] EEOC has not promulgated rules requiring employers such as Petitioner to develop or submit AAP's or comparable reports.[5] See 29 C.F.R. § 1602.1 *et seq.*

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employment opportunity program established by the Executive Orders. Executive Order 11246, Sec. 201. The Secretary discharges his responsibilities through OFCCP and has designated the Defense Supply Agency as one of the several "compliance agencies" responsible for monitoring government contractors' compliance with the Executive Orders, investigating complaints made against contractors, and imposing sanctions upon contractors who do not comply with the Executive Orders. Executive Order 11246, Subpart C; 41 C.F.R. §§ 60-1.2, 60-1.6; OFCCP, Federal Contract Compliance Manual, § 2-202. The EEOC has been charged by Congress with enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; EEOC is not responsible for enforcement of Executive Order 11246. See Contractors' Ass'n. of Eastern Pennsylvania v. Sec. of Labor, 442 F.2d 159, 171 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971).

[4] 29 C.F.R. § 1602.7.

[5] The reports which employers are required to submit to EEOC are both quantitatively and qualitatively different from the AAP's and other documents which government contractors furnish to OFCCP and compliance agencies.

On September 11, 1974, the predecessors of Respondents Marshall, Vaughan and Norton promulgated the regulations at issue in this case. The regulations, which were dubbed the "Memorandum of Understanding"[6] ("Memorandum"), provide essentially for three things. First, paragraphs 1 and 8 of the Memorandum require OFCCP and its contract compliance agencies to disclose to EEOC any documents or files, including affirmative action programs, pertaining to any government contractor against whom a charge is pending before EEOC. Second, paragraph 10 of the Memorandum provides that complaints filed with OFCCP pursuant to Executive Order 11246 shall automatically be deemed "charges" filed with EEOC and shall be transmitted to EEOC for processing by that agency as charges under Title VII of the Civil Rights Act. Finally, paragraphs 7 and 9 of the Memorandum delegate various investigative and prosecutorial functions from OFCCP to EEOC, and vice versa.

2. This action arose when, pursuant to the Memorandum, one of Respondent Norton's employees sought the disclosure by DSA to EEOC of certain DSA files (including AAP's) relating to Petitioner. The materials were sought by EEOC for the purposes of "developing" Petitioner as a "proposed respondent" in an action before the EEOC and, after naming Petitioner as a respondent, of investigating Petitioner's facilities. Over Petitioner's objections, DSA stated that disclosure to EEOC would proceed. Petitioner commenced this action to enjoin implementation of the challenged regulations.

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[6] 39 Fed. Reg. 35855 (1974).

On July 27, 1976, the district court issued its Memorandum Opinion and Order. There, the district court granted partial summary judgment in Petitioner's favor by holding that paragraph 10 of the Memorandum was unlawful because of Respondents' failure to comply with the requirements of § 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.[7] However, the district court also granted partial summary judgment against Petitioner, holding that paragraphs 1, 2, 8 and 9 were neither improperly promulgated nor beyond Respondents' authority.

On cross appeals, the court of appeals affirmed the district court's holding with respect to paragraphs 1, 2, 8 and 9, and reversed the district court's order regarding the complaint transfer procedure of paragraph 10. In reversing, the court of appeals rejected the district court's holding that paragraph 10 was promulgated in violation of 5 U.S.C. § 553, and also rejected Petitioner's assertion on appeal that paragraph 10 constituted an unlawful delegation of functions.[8]

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[7] The district court held that "Paragraph 10 of the Memorandum • • • allows a complaint directed to another agency to initiate EEOC's own procedural mechanism. • • • Paragraph 10 does not simply prescribe 'the methods by which the agency acts.' Instead it provides an entirely new device for initiating those methods. • • • Given the backlog of EEOC charges and the exposure to liability after 180 days of the filing, the Court holds that Paragraph 10 creates a substantial impact on Reynolds. Therefore, it is invalid for failure to comply with the notice and comment requirements of 5 U.S.C. § 553." App. B, *infra*, p. 23a.

[8] The district court recognized the possibility that paragraph 10 constituted an unlawful delegation, but found it unnecessary to reach that question. See App. B, *infra*, p. 25a.

REASONS FOR GRANTING THE PETITION

Although it is desirable that government agencies strive for greater efficiency, in doing so they must adhere strictly to the safeguards which have been established to protect the public from arbitrary and ill-conceived government action. In this case, Petitioner challenges regulations jointly promulgated by several government agencies which were apparently intended to enhance the efficiency of their operations, but which ignored inherent limitations on the authority of federal government agencies to alter the scope of their delegated authority, bypassed congressionally and administratively imposed limitations on the agencies' powers and operations, and disregarded the safeguards of the Administrative Procedure Act.

Resolution of the issues presented by this case is of broad public significance since the challenged regulations directly and significantly affect many thousands of government contractors[9] who are subject to the jurisdiction of both EEOC and OFCCP.[10] This case provides the Court with an excellent opportunity to resolve these issues since it vividly demonstrates the dangers to the public which arise when government

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[9] The Department of Labor has estimated that there are more than 275,000 federal non-construction contractors subject to Executive Order 11246. *See* General Accounting Office Report, "The Equal Employment Opportunity Program For Federal Nonconstruction Contractors Can Be Improved," GAO MWD-75-63 at 31-32 (April 29, 1975).

[10] The challenged regulations have spawned additional litigation in at least one other circuit. See Emerson Electric Corp. v. Rumsfeld, No. 75-55C(2) (E.D.Mo.); Chrysler Corp. v. Brennan, No. 74-850C(2) (E.D.Mo.); McDonnell Douglas Corp. v. Dunlop, No. 75-103C(2) (E.D.Mo.); Brown Group, Inc. v. Dunlop, No. 75-425C(2) (E.D.Mo.).

agencies rush headlong into a search for expedition and "efficiency", disregarding those deliberate processes established by Congress and by the agencies themselves to protect members of the public from the ill effects of precipitous government action.

1. The Equal Employment Opportunity Commission was created by Congress to administer Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-4 (1975). The Office of Federal Contract Compliance Programs was established by the Secretary of Labor under Executive Order 11246 to administer the equal employment opportunity program decreed by the Order. Executive Order 11246, §§ 201, 401; 41 C.F.R. § 60-1.2. While both agencies seek to accomplish the goal of attaining equal opportunity in employment, the agencies—each representing a different branch of government—are distinctly different in origin, responsibility and function.[11] One area in which this distinction is sharply drawn is in the processing of complaints from employees alleging unlawful discrimination by their employers.

Under Executive Order 11246 and OFCCP's regulations, an employee of a government contractor may file a complaint against the contractor with OFCCP or a compliance agency alleging violation by the contractor of its affirmative action obligations under the Executive Order. Executive Orer 11246, § 206(b); 41 C.F.R. § 60-1.21. OFCCP is responsible under the Order and its regulations for the investigation and resolution of such complaints. *Id.*; 41 C.F.R. §§ 60-1.22 through 60-1.24 (see App. D, *infra,* pp. 50a-54a). These responsibilities, and the detailed and comprehensive OFCCP complaint processing procedure, are wholly

[11] See n. 16, *infra.*

distinct from the congressionally prescribed process whereunder employees may file "charges" against their employers with the EEOC alleging violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5.

Paragraph 10 of the Memorandum of Understanding provides for the delegation by OFCCP of its complaint processing responsibilities to EEOC:

> "Complaints filed with OFCC[P] shall be deemed charges filed with EEOC and OFCC[P] shall promptly transmit such charges to the appropriate EEOC District Office." App. B, *infra,* p. 32a.

Under this regulation, OFCCP has sought to abdicate its authority and responsibility under Executive Order 11246 to process complaints arising under the Executive Order and OFCCP's rules.[12]

Paragraph 10, as well as several other provisions of the Memorandum,[13] constitutes a reallocation of administrative, investigative and prosecutorial functions between an Executive Branch agency and a congressionally created commission which is not only lacking in

[12] A recent Department of Labor report recognized that complaint processing has long been an important element in the contract compliance program, and that "the OFCCP *has maintained a clear authority to investigate complaints* from any employee or applicant who feels he or she has been discriminated against . . ." U.S. Department of Labor, Employment Standards Administration, OFCCP Task Force, "Preliminary Report on the Revitalization of the Federal Contract Compliance Program", at 140-141 (1977) (emphasis added).

[13] Paragraphs 7 and 9 of the Memorandum delegate between OFCCP and EEOC various of their investigative and prosecutorial functions and responsibilities under, respectively, Executive Order 11246 and Title VII. See App. B, *infra,* p. 30a, 31a.

express or implied authorization [14] but, in fact, is contrary to clear congressional intent.

In the course of enacting the Equal Employment Opportunity Act of 1972 [15] ("1972 Act"), Congress considered a proposal to transfer "all the authority, functions and responsibilities of the Secretary of Labor pursuant to Executive Order 11246 relating to contract compliance to the Equal Employment Opportunity Commission." See H.R.Rep. No. 92-238, 92nd Cong., 2 Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2150. The proposal encountered opposition in Congress and was deleted from the 1972 Act as enacted by Congress.

Passage of the 1972 Act without the transfer-of-authority provisions originally contemplated by the Committee Report evidenced a clear congressional intent to keep the responsibilities of OFCCP and EEOC separate and distinct.[16] Yet, in direct contravention of

[14] "[It is] essential to the successful working of this system [of separation of powers] that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other . . ." Kilbourn v. Thompson, 103 U.S. 168, 191 (1881).

[15] Pub.L. 92-261, 86 Stat. 104 (1972).

[16] In enacting the 1972 Act, Congress expressly stated its desire to keep separate the functions and operations of OFCCP (then OFCC) and EEOC:

> "While OFCC and EEOC share the goal of promoting the civil rights of minority workers, the programs they are presently administering are considerably different . . . The merging of these two distinct functions in a single agency will create serious problems and such combination will undoubtedly work to the detriment of both programs." H.R.Rep. No. 92-238, *supra*, 1972 U.S. Code Cong. & Ad. News at 2173.

this legislative mandate, paragraphs 7, 9 and 10 of the Memorandum of Understanding delegate investigative, prosecutorial and administrative responsibilities from OFCCP to EEOC."

This case thus raises important questions concerning the extent to which government agencies may cross-delegate distinct administrative, investigative and prosecutorial responsibilities and powers separately imposed upon them by statute and by executive order when express or implied authorization to reallocate those functions is lacking. Petitioner submits that government agencies, in carrying out their respective programs and even in the course of seeking out ways to achieve greater efficiency, may neither ignore nor depart from carefully fashioned divisions of responsibility decreed by proper legislative and executive authority. The Memorandum contravenes this basic principle in a number of ways and therefore provides an ideal vehicle for clarification of the standards to which federal agencies must adhere.

2. In giving EEOC the authority to acquire information from employers, Congress purposely imposed restrictions which were intended to protect employers from overzealous use of EEOC's investigative powers.[18]

[17] It is well-established that the Executive may not do what Congress has forbidden, Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579 (1952), or attempt to reach a result where Congress has refused to legislate, Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949). Paragraphs 7 and 9 of the Memorandum of Understanding constitute just such an effort to accomplish a delegation of agency functions which Congress has expressly refused to permit.

[18] This purpose is evidenced in the following exchange which took place on the Senate Floor during debate on the investigative powers

Thus, § 709(a) of Title VII states that, in investigating a charge, the EEOC may obtain "evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title *and is relevant to the charge under investigation.*" 42 U.S.C. § 2000e-8(a) (emphasis added); see also EEOC Compliance Manual, § 21.2(a). The means for actually obtaining such information are prescribed in § 710 of Title VII, 42 U.S.C. § 2000e-9, which sets out a demand and subpoena process which EEOC must follow in seeking to acquire information from an employer under investigation, and which provides safeguards in the form of repeated opportunities for the employer to object to production of the information [19] on the grounds of relevance as well as burdensomeness.[20]

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of the EEOC:

> "Question [by Senator Dirksen]: What protection is afforded to an employer from a fishing expedition by investigators in their zeal to enforce Title VII?
>
> "Answer [by Senator Clark]: . . . *The employer is entitled to a day in court before the Commission inspects any records; he can contest the subpoena. Private records will be amply protected by the courts.*" 110 Cong. Rec. at 7216 (September 8, 1964) (emphasis added).

[19] Section 710, which incorporates the provisions of 29 U.S.C. § 161, provides that EEOC may make an information demand upon an employer. If the employer objects to the demand, EEOC may issue an administrative subpoena to obtain the information. The employer may then challenge the subpoena before the agency on grounds of, *inter alia*, relevance. Should EEOC uphold its subpoena, the employer may still resist, and EEOC is then required to resort to judicial enforcement of the subpoena in a district court where, once again, the employer has the right to resist by showing the irrelevance of the information sought by EEOC. 42 U.S.C. § 2000e-9; 29 U.S.C. § 161. See App. D, *infra* pp. 41a, 38a-39a.

[20] The district court erroneously held that an EEOC subpoena could be challenged for burdensomeness only. App. B, *infra*, p. 25a. As is clearly apparent from the statute, irrelevance was contemplated to be an equally compelling ground for challenging a subpoena. *See* 29 U.S.C. § 161(1); 42 U.S.C. § 2000e-9, App. D, *infra*, p. 38a, 41a.

The Memorandum of Understanding constitutes a device by which EEOC seeks to avoid these restraints upon its investigative powers. The Memorandum provides that OFCCP, DSA and other compliance agencies must furnish to EEOC all documents pertaining to a contractor against whom a charge has been filed, but does *not* require that the information disclosed relate to the specific charge under investigation (as does § 709(a).[21] Nor does the Memorandum afford an employer an opportunity to interpose, *prior* to disclosure, an objection to disclosure of its documents to EEOC on the ground of relevance,[22] a right which the contractor would be guaranteed if EEOC sought the information directly from the contractor by demand or subpoena, as contemplated by § 710. Thus, the Memorandum of Understanding improperly allows EEOC to bypass, indeed abrogate, both the statutorily prescribed route for obtaining such information where questions of relevance and privilege would ultimately

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[21] EEOC has sought to acquire OFCCP files regarding Petitioner in an attempt to "develop" charges (i.e., to generate a Commission initiated charge) against a facility with respect to which *no* charge was then pending. This violates not only the relevance standard of § 709(a), but also the terms of the Memorandum itself, which authorizes EEOC to acquire OFCCP files only when a charge is pending. Memorandum, para. 1, App. D, *infra*, p. 28a.

[22] EEOC can obtain DSA's entire files on Petitioner, containing information concerning the race, sex, religion and national origin of Petitioner's workforce, when the EEOC charge being investigated may pertain to only one of those categories, thereby rendering the remaining information irrelevant to the issues and charges under investigation. See EEOC Compliance Manual, § 21.1(a); 42 U.S.C. § 2000e-8(a); App. B, *infra*, p. 33a.

be subject to court determination *prior* to disclosure,[23] and the statutorily prescribed relevance standard,[24] and authorizes precisely the kind of "fishing expedition" which Congress sought to guard against by imposing the relevance requirement of § 709(a) on EEOC's information gathering authority.[25]

Similarly, the Memorandum seeks to bypass the restrictions on EEOC information gathering from employers contained in § 709(c) of Title VII, 42 U.S.C. § 2000e-8(c), and §§ 1602.1-1602.4 of EEOC's regulations, 29 C.F.R. §§ 1602.1-1602.4. Those laws require EEOC to conduct a public hearing prior to adoption of employer reporting requirements. Section 709(c) was enacted by Congress not only for the purpose of pro-

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[23] See, e.g., EEOC v. Western Pub. Co., 502 F.2d 599 (8th Cir. 1974); U.S. Steel Corp. v. EEOC, 6 EPD ¶ 8981 (3rd Cir. 1973), *affirming* 6 EPD ¶ 8980 (W.D.Pa. 1973); Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1973).

[24] While §§ 709(a) and 710 do not expressly apply to interagency transfers of information, the point here is that, absent the Memorandum, EEOC could obtain a contractor's data only through, and in compliance with, the procedures of §§ 709(a) and 710. Yet the Memorandum allows EEOC to evade the limitations of those sections by giving EEOC unfettered access to the very same data of the contractor which is contained in OFCCP's files.

[25] It is not government contractors alone who are adversely affected by this provision of the Memorandum. The Executive Order equal employment opportunity program is heavily dependent upon the voluntary cooperation of government contractors in submitting full and frank self-evaluations. Unless federal agencies such as OFCCP are held to a strict standard of conduct in dealing with documents submitted to them by the businesses they regulate, contractors such as Petitioner are bound to be reluctant to continue to freely submit full and frank self-evaluative analyses of their employment practices to the Government. This result would ultimately be of disservice to the public, the Government, and particularly, the equal employment opportunity program.

tecting employers from burdensome or duplicative reporting requirements which EEOC might impose, but also to ensure against the overly broad collection by EEOC of information from employers which, wholly apart from considerations of burdensomeness, might be objectionable because either (1) the information is irrelevant to the agency's statutory purposes; (2) the reporting requirement bypasses statutorily imposed restrictions on EEOC's power to collect such information; or (3) the reporting requirement amounts to an unjustified fishing expedition into employers' records.[26]

The Memorandum establishes a means by which EEOC may gain, on a recurring and virtually automatic basis, access to the AAP's and related comprehensive records compiled annually by government contractors, without complying with the requirements of § 709(c). While it is true that the Memorandum itself does not impose a direct reporting requirement on employers, it must be recalled that: (1) the AAP's and related information which EEOC obtains from OFCCP and DSA pursuant to the Memorandum are obtained by those agencies directly from the public;[27] (2) the Memorandum was promulgated by EEOC and OFCCP for the very purpose, *inter alia*, of enabling EEOC to obtain the wealth of information which OFCCP and DSA have collected directly from Petitioner and other

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[26] The inclusion of a public hearing requirement prior to implementation of employer reporting requirements was not a mere formality. The House version of the Civil Rights Bill contained no prior hearing requirement, and this language was added to the final bill after a joint committee conference. *Compare* H.R.Rep.No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2406, *with* 42 U.S.C. § 2000e-8(c).

[27] See 41 C.F.R. § 60-1.7.

government contractors; (3) the Memorandum thus has the same practical effect as if EEOC were itself collecting the AAP's and related information directly from the public; and (4) but for the Memorandum, EEOC could gain access to such information on a recurring and automatic basis *only* by imposing such a reporting requirement on employers, by first complying with the public hearing requirements of § 709(c), and by considering employers' claims that such information is irrelevant to or unnecessary for EEOC's duties.

To date, EEOC has not adopted regulations requiring employers to file AAP's with the EEOC and, thus, has not afforded such employers the opportunity to object to the imposition of such a requirement. Yet, under the veil of the Memorandum, EEOC is currently acquiring those very documents on a recurring basis.

In both of these respects, the Memorandum subverts the clear congressional intent that EEOC's information gathering powers be limited in the ways enumerated in §§ 709(a) and 709(c) of Title VII.

3. The Administrative Procedure Act ("APA") requires, subject to limited exceptions,[28] that a government agency give the public notice of, and an opportunity to comment on, the agency's proposal to promulgate new regulations. 5 U.S.C. § 553 *et seq.* The purpose of this requirement is to protect the public from arbitrary regulation, and to assure that the agency gives fair and mature consideration to affected interests in promulgating rules of general application. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), citing H.R. Rep. 1980, 79th Cong., 2d Sess. (1946) at 21-26 ("H.R.

[28] 5 U.S.C. § 553(a)(1), 553(b)(B), 553(a)(2) and 553(b)(A). App. D, *infra*, pp. 37a-38a.

Rep. 1980"), *reprinted in* 1946 U.S. Code Cong. & Ad. News at 1205. 21-26; S.Rep.No. 752, 79th Cong,, 1st Sess., 12-16 (1945). *See also Texaco, Inc.* v. *FPC*, 412 F.2d 740, 744 (3rd Cir. 1969).

As expressly stated by Congress in enacting the APA, "[t]he bill is an outline of *minimum* essential rights and procedures." H.R.Rep. 1980 at 1205. "[M]ost of our law on administrative procedure is judge-made law. The APA codifies some of the minimum requirements." [29] Consequently, even when a proposed regulation appears to fall within one of the limited exceptions to § 553, the principles underlying the APA may nevertheless mandate that the public be given prior notice of, and an opportunity to comment upon, proposed agency regulations. *See Kennecott Copper Corp.* v. *EPA*, 462 F.2d 846 (D.C.Cir. 1972).

Courts have articulated a number of tests to determine when prior notice and comment will be necessary. Unfortunately, the numerous tests fashioned to date have not only different terminology but, more significantly, a widely disparate impact on persons who will be affected by promulgation of proposed regulations without prior notice and opportunity to comment. Thus, courts have run the gamut, stating in some cases that the test for prior notice and comment under § 553 is whether the rules are "substantive or procedural"; [30] stating in others that the test is whether the rules will

[29] Davis, ADMINISTRATIVE LAW OF THE SEVENTIES (1976 Supplement to ADMINISTRATIVE LAW TREATISE), 198.

[30] *See, e.g.*, Ranger v. Federal Communications Commission, 294 F.2d 240, 243-4 (D.C.Cir. 1961).

have an impact on persons' "rights and obligations";[31] and, in still others, rejecting both of those tests and stating, instead, that the test is whether the rules will have a "substantial impact" upon persons affected by the rules.[32] Indeed, the confusion concerning the proper test under § 553 is reflected by the fact that, in the instant case, (1) no less than six distinct tests were suggested by both the courts and the parties for determining whether the Memorandum should have been subject to the prior notice and comment requirement;[33] and (2) in resolving that question, the courts below ap-

[31] *See, e.g.*, EEOC v. Raymond Metal Products Co., 530 F.2d 590 (4th Cir. 1976).

[32] *See, e.g.*, National Motor Freight Traffic Assn., Inc. v. United States, 268 F.Supp. 90 (D.D.C. 1967) (three judge court), *aff'd per curiam*, 393 U.S. 19 (1968); Texaco, Inc. v. FPC, *supra;* Pharmaceutical Manufacturers Assn. v. Finch, 307 F.Supp. 858 (D.Del. 1970).

[33] These tests included: (1) whether the Memorandum had a substantial impact on affected members of the public (Petitioner's Fourth Circuit Brief at 25-46); (2) whether the Memorandum had a "direct and immediate" impact upon affected members of the public (Respondents' Fourth Cir. Br. at 11-13); (3) whether the Memorandum was "substantive" or merely "procedural" (Respondents' Fourth Cir. Br. at 10); (4) whether the Memorandum had "the force and effect of law" (Respondents' Fourth Cir. Br. at 10); (5) whether the Memorandum "creates or changes existing rights and obligations" (App. B, infra, p. 22a); and (6) whether the Memorandum had a substantive impact on the rights and duties of the persons subject to the regulation (App. A, *infra*, p. 10a).

plied different tests to different portions of the Memorandum.[34]

As evidenced by the foregoing, the courts are uncertain, if not in conflict, concerning the proper test to be employed in determining when prior notice and comment must be afforded under § 553. Clarification by this Court on this question is of unusually broad public significance since the matter is one which transcends the Memorandum of Understanding and which bears upon the promulgation of administrative regulations by *all* federal agencies. The guidance needed by the courts of appeals can be provided only by this Court.[35]

[34] The district court used the "substantial impact" test in determining whether paragraph 10 of the Memorandum should have been subject to the prior notice and comment requirement but, with respect to paragraphs 1, 2, 8 and 9, used the test of "whether [the Memorandum] is procedural or substantive; more precisely, whether it creates or changes existing rights and obligations." App. B, *infra*, pp. 22a-23a. The court of appeals adopted the district court's analysis with respect to paragraphs 1, 2, 8 and 9, and also applied a version of the "rights and obligations" test to paragraph 10. App. A, *infra*, pp. 10a-12a.

[35] The "substance vs. procedure" and "rights and obligations" tests have been rejected by a number of courts as "facile, semantic distinction[s]" which do little to clarify whether a regulation should be subject to the notice and comment requirement. *See, e.g.*, Pharmaceutical Manufacturers Assn. v. Finch, *supra* 307 F.Supp. at 863; National Motor Freight Traffic Assn. v. United States, *supra* 268 F.Supp. at 90; Kennecott Copper Corp. v. EPA, *supra*. Instead, Petitioner submits that the correct standard, which this Court should expressly endorse, is that "when a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided." Pharmaceutical Manufacturers Assn. v. Finch, *supra*, 307 F.Supp. at 683.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 3, 1978

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2124

REYNOLDS METALS COMPANY, *Appellant,*

v.

DONALD H. RUMSFELD, Secretary, U. S. Department of Defense; W. J. USERY, Secretary, U.S. Department of Labor; LAWRENCE Z. LORBER, Director, Office of Federal Contract Compliance Programs; LT. GENERAL WOODROW W. VAUGHAN, Director, Defense Supply Agency, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ETHEL BENT WALSH, Acting Chairman, *Appellees.*

No. 76-2125

REYNOLDS METALS COMPANY, *Appellee,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ETHEL BENT WALSH, Acting Chairman, *Appellant,*

and

DONALD H. RUMSFELD, Secretary, U. S. Department of Defense; W. J. USERY, Secretary, U.S. Department of Labor; LAWRENCE Z. LORBER, Director, Office of Federal Contract Compliance Programs; LT. GENERAL WOODROW W. VAUGHAN, Director, Defense Supply Agency, *Defendants.*

No. 76-2126

REYNOLDS METALS COMPANY, *Appellee,*

v.

DONALD H. RUMSFELD, Secretary, U. S. Department of Defense; W. J. USERY, Secretary, U.S. Department of Labor; LAWRENCE Z. LORBER, Director, Office of Federal Contract Compliance Programs; LT. GENERAL WOODROW W. VAUGHAN, Director, Defense Supply Agency, *Appellants,*

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ETHEL BENT, WALSH, Acting Chairman, *Defendant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued May 4, 1977 Decided Oct. 14, 1977

Before LEONARD P. MOORE, *Senior Circuit Judge,* Second Circuit, sitting by designation, and BUTZNER and HALL, *Circuit Judges.*

Burt A. Braverman (Frances Chetwynd, Cole, Zylstra & Raywid; Austin B. Graff on brief) for appellant in 76-2124 and for appellee in 76-2125 and 76-2126; John D. Schmelzer, Attorney, Equal Employment Opportunity Commission (Alfred G. Albert, Acting Solicitor of Labor, James D. Henry, Associate Solicitor of Labor, David A. Drachsler, Counsel for Equal Opportunity Programs, Department of Labor; Abner W. Sibal, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Assistant General Counsel, Equal Employment Opportunity Commission on brief) for appellees in 76-2124 and for appellants in 76-2125 and 76-2126.

BUTZNER, *Circuit Judge:*

This appeal and cross appeal arise from the district court's grant of summary judgment in a case brought by Reynolds Metals Company seeking declaratory and injunctive relief from operation of a 1974 Memorandum of Understanding between the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance Programs (compliance office). The district court upheld the validity of paragraphs 1, 2, 8, and 9 of the Memorandum, which authorize these agencies to exchange information concerning employers' compliance with laws and regulations forbidding discrimination. It invalidated paragraph 10 of the Memorandum which provides that complaints filed with the compliance office shall be deemed charges filed with the commission. This paragraph also directs the compliance office to transmit such complaints to the commission.[1] We affirm the district court's decision upholding the paragraphs dealing with the exchange of information, and we reverse the ruling that paragraph 10 is invalid.

I

Both the commission and the compliance office are responsible for eliminating discrimination in employment based on race, color, religion, sex, or national origin. For a number of years they have shared information obtained from employers, employees, and their own investigators. In 1974 they executed the Memorandum of Understanding to establish procedures for this exchange of information and for the transmission of complaints.[2] The agencies base their

[1] The district court's opinion is reported as Reynolds Metals Co. v. Rumsfeld, 417 F.Supp. 365 (E.D. Va. 1976). The Memorandum of Understanding is reproduced as appendix I to that opinion, 417 F.Supp. at 374-76.

[2] The Memorandum of Understanding was published in 39 Fed. Reg. 35855 (1975). A 1970 version was published in 35 Fed. Reg. 18461 (1970).

joint activity on well defined authority. The Civil Rights Act authorizes the commission to cooperate with other public agencies.[3] Likewise, the compliance office's regulations for implementing Executive Order 11246 explicitly state that information and reports obtained pursuant to those regulations will be used in connection with the administration of both the Order and the Civil Rights Act.[4]

As a government contractor, Reynolds must comply with Executive Orders 11246 and 11375[5] and with the compliance office's implementing regulations.[6] These rules require each government contractor to prepare affirmative action programs for submission to the federal agency contracting with it. The programs must identify the contractor's deficiencies concerning the equal employment of minority workers and set corrective goals and timetables. The contracting agency receiving the information is deemed a compliance agency for the purpose of enforcing Executive Order 11246. It reviews the government contractor's policies and practices concerning the employment of minorities and furnishes the compliance office detailed information on the subject, including copies of the material supplied by the contractor.

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[3] *See* 42 U.S.C. § 2000e-4(g)(1).

[4] The pertinent regulations are 41 C.F.R. §§ 60-1.7(c) and 60-1.43. *See* n.7 *infra*.

Executive Order 11246 is published in 30 Fed. Reg. 12319 (1965). This Order requires federal contractors to include an equal opportunity clause forbidding employment discrimination on the basis of race, color, creed, or national origin in their contracts. Contractors must also agree to take affirmative action to ensure non-discriminatory hiring and treatment of their employees.

[5] Executive Order 11375, which modifies Executive Order 11246 by adding discrimination based on sex to its proscriptions, is published in 32 Fed. Reg. 14303 (1967).

[6] 41 C.F.R. § 60-1.1 *et seq.*

Reynolds submitted its program and related documents to its contracting and compliance agency, the Defense Supply Agency of the Department of Defense. Pursuant to the Memorandum, the commission requested copies of the information Reynolds had furnished about its Sheffield, Alabama, facility. Reynolds then brought this action for declaratory and injunctive relief. It contends that the Memorandum of Understanding is unlawful, and it seeks to restrain the government officials responsible for the operation of the Defense Supply Agency and the compliance office from furnishing the commission information about its employment practices.

The district court held that the provisions in the Memorandum of Understanding for the exchange of information did not run afoul of the Federal Reports Act, the Administrative Procedure Act, or the regulations governing inter-agency reports. It also ruled that the Memorandum conformed to Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972. It found no violation of the principles of administrative due process.

The district court's thorough consideration of these issues dispenses with any need for us to discuss them. We will, however, address a point Reynolds presses on appeal which the district court did not discuss, probably because Reynolds presented it only obliquely.

Reynolds asserts that its programs and related information are protected from disclosure to the commission by a qualified privilege for self-evaluative documents. It relies on Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973), a medical malpractice suit in which the court protected from disclosure reports prepared by a hospital review committee for purely internal purposes. The *Bredice* court justified this qualified privilege because of the need to encourage frank, candid self-evaluation.

The privilege recognized in *Bredice* is not available to Reynolds. The company's reports were not prepared solely for internal use, or even for the external use of only the Defense Supply Agency and the compliance office. When Reynolds contracted with the government, the regulation requiring the reports placed Reynolds on notice that they also would be used for administration of the Civil Rights Act of 1964.[7] Since the commission, not the compliance office, is charged with primary responsibility for enforcing this Act, Reynolds cannot claim that the information it furnished the Defense Supply Agency is protected by a qualified privilege from disclosure to the commission.[8]

For the reasons stated by the district court in its well considered opinion, supplemented by our discussion of Reynolds' claim of a qualified privilege, we conclude that paragraphs 1, 2, 8, and 9 of the Memorandum of Understanding are valid. Reynolds therefore is not entitled to an injunction restraining the respondents from delivering the information that tthe commission seeks.

II

Paragraph 10 of the Memorandum of Understanding provides:

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[7] 41 C.F.R. § 60-1.7(c) provides:

> Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.

Other information is made available for administration of the Civil Rights Act by 41 C.F.R. § 60-1.43.

[8] 41 C.F.R. §§ 60-1.7(c) and 60-1.43 (*see* n.7 *supra*) serve to distinguish this case from Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), which holds that reports furnished pursuant to Executive Order 11246 are exempt from disclosure under the Freedom of Information Act.

> Complaints filed with OFCC [the compliance office] shall be deemed charges filed with EEOC and OFCC shall promptly transmit such charges to the appropriate EEOC District Office.

Reynolds contends that this provision is invalid for two closely related reasons: It unlawfully delegates to the commission the compliance office's responsibility for processing the complaints, and it was promulgated in violation of the notice and comment requirements of the Administrative Procedure Act. The government asserts that instead of delegating the compliance office's responsibility, the paragraph simply provides that the compliance office will act as an agent for the commission by receiving and transmitting misdirected complaints. Because of this limited function, the government says the notice and comment requirements of the Administrative Procedure Act are not applicable.

The district court decided that paragraph 10 provided a new means for initiating complaints to the commission and that it created a substantial impact on Reynolds because of the commission's backlog of undecided charges and the consequent exposure of the company to liability. It therefore concluded that the government's failure to comply with the notice and comment requirements of the Administrative Procedure Act invalidated paragraph 10, and it enjoined the government from implementing that paragraph insofar as Reynolds is concerned. The government filed a cross-appeal assigning error to this aspect of the court's judgment.[9]

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[9] While this suit was pending, after providing notice and an opportunity to comment pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, the compliance office modified its regulations to allow it to refer appropriate complaints to the commission. The compliance office did not, however, modify or rescind the Memorandum of Understanding. It said that its focus upon systemic discrimination reflects existing policy. 42 Fed. Reg. 3455 (1977).

In support of its claim that the Memorandum improperly delegates the compliance office's responsibility for processing complaints, Reynolds emphasizes that the regulations implementing Executive Order 11246 direct the compliance office and compliance agencies to promptly investigate and resolve all complaints about discrimination filed with them against a government contractor.[10] Reynolds asserts that transmitting such complaints to the commission does not comply with the regulations and constitutes an unlawful delegation of the compliance office's authority.

Reynolds's claim must be considered in light of the closely related functions of the compliance office and the commission. Moreover, the interpretation that the compliance office and the commission place on the statutes, Executive Orders, and regulations charting their respective functions deserves great deference. Udall v. Tallman, 380 U.S. 1, 16 (1965); Egelston v. State University College at Geneseo, 535 F.2d 752, 755 n.4 (2d Cir. 1976). Both agencies are charged with the responsibility of eliminating employment discrimination, but their specific missions differ. The compliance office monitors government contractors to determine whether they are meeting their commitments as equal opportunity employers. It gives priority to the eradication of systemic discrimination rather than to the investigation and resolution of complaints about isolated instances of discrimination. The duty of the compliance office and compliance agencies to receive and promptly process complaints must be considered in this context. The complaints which they process are those dealing with systemic violation of a company's contractual obligations to comply with the requirements of Executive Order 11246, rather than those dealing with the violation of rights afforded an individual employee under Title VII. The sanctions available to the compliance office—terminating or suspending a contract, prohibiting a contractor from bidding on future business, and withholding progress payments—reflect the

[10] *See* 41 C.F.R. § 60-1.24.

systemic nature of the compliance office's concern. They are regarded by the compliance office as inappropriate remedies for a case of isolated discrimination against a single employee.

The commission, on the other hand, is responsible for dealing with complaints from individual employees about unfair employment practices. It must notify the employer of the charge, conduct an investigation, and if appropriate, attempt conciliation. Only after an individual employee has exhausted the administrative remedies afforded by the commission can he bring suit for relief under Title VII of the 1964 Act.[11]

The compliance office's transmission to the commission of individuals' complaints about discrimination facilitates the operation of both agencies and eliminates wasteful duplication of effort. It would be irresponsible for the compliance office to do nothing upon receipt of a complaint that charges a violation of Title VII. Returning the complaint to the employee with the suggestion that he send it to the commission would delay the administrative process and would accomplish nothing more than transmission by the compliance office. Time and money would be wasted if the compliance office conducted full administrative proceedings about a charge that on its face required referral to the commission. None of these alternatives is a satisfactory substitute for the simple procedure established by paragraph 10.

We conclude that the compliance office's conception of its function with respect to both systemic and isolated acts of discrimination is consistent with Executive Order 11246 and the pertinent regulations. Its decision to retain jurisdiction over acts of systemic discrimination and to transfer complaints about violations of Title VII to the commission

[11] *See* 42 U.S.C. §§ 2000e-2 and 5; Stebbins v. Nationwide Mutual Insurance Co., 382 F.2d 267 (4th Cir. 1967).

is founded on a reasonable interpretation of those documents. Consequently, transmission of complaints to the commission pursuant to paragraph 10 is not an unlawful delegation of the compliance office's authority.

III

The remaining issue is whether paragraph 10 was promulgated in accordance with the requirements of the Administrative Procedure Act. The Memorandum of Understanding, including paragraph 10, is a rule as defined by 5 U.S.C. § 551(4), and it was published in the Federal Register as prescribed by 5 U.S.C. § 552(a)(1). However, it was not promulgated in accordance with those provisions of 5 U.S.C. § 553 which require advance public notice and an opportunity for interested persons to comment on the proposal. The government contends that the Memorandum is exempt from those rulemaking procedures because § 553 by its own terms does not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).

To draw the line between substance and procedure in the context of administrative rulemaking, courts have generally held that notice and comment is required if the rule makes a substantive impact on the rights and duties of the person subject to regulation. If the rule does not have such an impact, it is exempt from the notice and comment requirements of the statute. *See* Pickus v. United States Board of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974); Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481 (2d Cir. 1972); Texaco, Inc. v. Federal Power Commission, 412 F.2d 740, 744 (3d Cir. 1969); *cf.* EEOC v. Raymond Metal Products Co., 530 F.2d 590, 593 (4th Cir. 1976).

As our previous discussion about the functions of the commission and the compliance office indicates, examination of the practical implications of paragraph 10 reveals that it has no substantive impact on Reynolds. It neither

diminishes nor increases the company's rights and duties under the Executive Order and Title VII. It simply provides an expeditious means of transmitting to the commission complaints that should have been mailed to it in the first place. The commission could probably obtain the same result—prompt receipt of Title VII complaints—by stationing some of its own employees at the compliance office, but at far greater expense. By either method of operation the impact on Reynolds would be the same.

It is reasonable for an agency that receives a misfiled complaint to forward it to the appropriate agency. The Supreme Court's decision in Love v. Pullman Co., 404 U.S. 522 (1972) supports this view. In that case, the Court approved the commission's referral of a prematurely filed charge to the appropriate state agency and its filing of the charge when the state agency declined to act on it. The Court said:

> To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process. 404 U.S. at 526-27.

Referring to "the flexible approach toward filing requirements taken in *Love*" the Second Circuit has held that a filing with the compliance office constitutes a filing with the commission. Egelston v. State University College at Geneseo, 535 F.2d 752, 755 n.4 (2d Cir. 1976); *see also* EEOC v. Collator Corp., 7 F.E.P. Cases 1258 (9th Cir. 1974) *summarily rev'g.* 7 F.E.P. Cases 934 (W.D. Wash. 1973).[13]

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[13] These cases dealt with the effect of filing a charge with the compliance office on the period of limitations set forth in Title VII, 42 U.S.C. § 2000e-5(e). This issue is not raised in the case before us.

Although *Love* dealt with a different aspect of Title VII procedure, its common sense interpretation of technical filing requirements is appropriate here. An employee of a federal contractor is confronted by the procedural strictures of two administrative agencies. When he applies for relief at the wrong forum, his complaint should be promptly considered by the proper agency. By facilitating such consideration, paragraph 10 avoids technical bars to the administration of Title VII without affecting Reynolds's substantive rights.

We therefore conclude that paragraph 10 was properly promulgated by publication pursuant to 5 U.S.C. § 552 (a)(1), and that there was no need to follow the notice and comment procedures of § 553.

The judgment of the district court is affirmed in part and reversed in part and this case is remanded for further proceedings consistent with this opinion.

No. 76-2124—affirmed
No. 76-2125—reversed
No. 76-2126—reversed

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION No. 76-302-A

REYNOLDS METALS COMPANY, *Plaintiff*,

v.

DONALD H. RUMSFELD, *et al.*, *Defendants*.

Memorandum Opinion and Order

This action attacks a 1974 Memorandum of Understanding between the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance, now called the Office of Federal Contract Compliance Programs (OFCCP), of the Department of Labor. Both of these agencies are responsible for enforcing the national policy of equal employment opportunities regardless of race, color, religon, sex or national origin.[1] The twelve paragraph Memorandum, which is attached as Appendix I, provides for informational exchanges between the two agencies and, in Paragraph 10, provides that complaints

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[1] EEOC is empowered to prevent unlawful employment discrimination generally. Section 706 of Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000e-5. In contrast, OFCCP deals only with equal employment opportunities among government contractors. Executive Order No. 11246, § 202, § 401; 41 C.F.R. § 60-1.2.

filed with OFCCP shall be deemed charges filed with EEOC. The information exchanged includes "raw" data submitted to the agencies by employers and reports prepared by the government agencies; i.e., EEOC, OFCCP and the individual compliance agencies contracting with the private sector. The Defense Supply Agency (DSA) is one such compliance agency.

Plaintiff Reynolds Metals Company (Reynolds), as a government contractor, is required to comply with Executive Orders 11246 and 11375 (30 Fed. Reg. 12319 and 32 Fed. Reg. 14303) and with OFCCP's implementing rules and regulations. Among these regulations is the requirement that Reynolds submit to its compliance agency affirmative action programs (AAP's), which are workforce analyses of all major job groups in an employer's facilities.[2] The compliance agency, DSA, uses these AAP's in reviewing Reynolds to determine whether the policy of equal employment opportunities is being followed. DSA's conclusions are then gathered in its compliance review reports. 41 C.F.R. § 60-60.1 *et seq.*

Pursuant to the Memorandum, DSA has been requested to make available to EEOC copies of all of the AAP's and related contractor documents concerned with Reynolds' Sheffield, Alabama facility.[3] Reynolds is not required, and

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[2] "An acceptable affirmative program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his workforce where deficiencies exist." 41 C.F.R. § 60-2.10.

[3] As is seen from Appendix I, the Memorandum imposes various requirements upon the two agencies. Although the plaintiff attacks the Memorandum as a whole, its argument as to its immediate effect centers around the threatened availability of the AAP's to the EEOC pursuant to Paragraph 1 of the Memorandum. Moreover,

has not volunteered, to submit these directly to EEOC. In this action it challenges the legality of the informational exchange as outlined in the Memorandum of Understanding as well as Paragraph 10.

Declaratory and injunctive relief are sought. Jurisdiction is asserted on a number of grounds. The Court concludes that there is jurisdiction under 28 U.S.C. § 1331(a) because the amount in controversy is sufficiently alleged and the case arises under 44 U.S.C. § 3501 *et seq.* and under Executive Order 11246 and regulations promulgated thereunder. Additionally, there is jurisdiction under 28 U.S.C. § 1337 because the case arises under 42 U.S.C. § 2000e *et seq.* Finally, there is jurisdiction under 5 U.S.C. § 704 because the case arises under 5 U.S.C. § 553.

The matter was argued on June 25, 1976, on the defendants' Motion to Dismiss, or in the alternative for Summary Judgment, and on plaintiff's Motion for Summary Judgment. The parties agree that there is no genuine issue as to any material fact; that the facts are not in dispute; and that the action may be determined without the need of additional evidence. The plaintiff has submitted proposed findings of fact, and the Court, with certain exceptions and even though they are at times conclusory or argumentative,[4] adopts them as its findings of fact in support of the summary judgment award.

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the defendants have conceded that Paragraphs 1, 2, 8, 9 and 10 of the Memorandum have been implemented with respect to the plaintiff. Answers to Interrogatory No. 2. This, in the Court's view, is dispositive of the issue whether plaintiffs have standing, at least insofar as those paragraphs are concerned, to contest their validity.

[4] The Court rejects proposed finding numbers 11 and 15 as self-serving and, with regard to number 11, as contrary to the Court's conclusion on consent.

The Court rejects proposed finding number 30 because it is a conclusion of law.

The Court rejects proposed finding number 39 because it draws

In their Motion to Dismiss the defendants raise, first, the defense that while nominally against the individual parties, the action is in fact against the United States and is barred by the doctrine of sovereign immunity.

In rejecting this defense the Court need only quote what it said in *Westinghouse Electric Corp.* v. *Schlesinger*, 392 F. Supp. 1246, 1248 (E. D. Va. 1974):

> The Court concludes that the relief sought, if granted, would not "expend itself on the public treasury or domain, or interfere with the public administration" to the extent that the Government would be "stopped in its tracks." Land v. Dollar, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); and that the actions of the federal officers are sufficiently alleged to be beyond their statutory powers so that those actions would not be the actions of the sovereign. Dugan v. Rank, 372 U.S. 609, 621, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).

Defendants also raise the question whether there is a case or controversy ripe for judicial resolution. Closely related to this is the question of standing, also contested by defendants. Insofar as the *Motion to Dismiss* is concerned, where

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an untenable conclusion of general policy from one specific incident.

The Court also rejects proposed finding number 50 because its breadth suggests that AAP's and related data obtained by EEOC from OFCCP would be available to a charging party. The Court accepts EEOC's contention that it will require charging parties to seek such documents directly from OFCCP. (Defendants' Memorandum in Support of the Motion to Dismiss, or in the Alternative, for Summary Judgment, Exhibit C.)

The Court adopts the following proposed findings as stated in "Plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue": 1-9, 13, 14, 16-22, 26-29, 31-35, 37, 38, 41-48.

The Court adopts the following proposed findings as modified in Appendix II: 10, 12, 23, 24, 25, 36, 40 and 49.

the sufficiency of the complaint is to be tested by its *allegations*, these defenses must be rejected. There is a sufficient allegation of substantial and immediate impact on the plaintiff by defendants' actions. *Gardner* v. *Toilet Goods Ass'n.*, 387 U.S. 167 (1967). Although the actual extent of this impact will be discussed *infra* in the part of the opinion addressing the motions for summary judgment, the allegations of impact are sufficient to survive the challenge to justiciability and standing.

The Motion to Dismiss must, therefore, be denied.

The Court turns, then, to the motions for summary judgment. The Memorandum is attacked on a number of grounds. First, that it violates the Federal Reports Act, 44 U.S.C. § 3501 *et seq.*; second that it was promulgated in violation of the Administrative Procedure Act (APA), Title VII of the Civil Rights Act of 1964 and the EEOC's own regulations; third, that it violates § 715 of Title VII of the Civil Rights Act of 1964; fourth, that it violates the Congressional intent underlying the Equal Opportunity Act of 1972; fifth, that it seeks to bypass prescribed restrictions on EEOC information gathering; sixth, that defendants failed to obtain necessary General Services Administration (GSA) approval for the Memorandum; and seventh, that it violates established principles of administrative due process by failing to afford a contractor such as the plaintiff an opportunity to be heard.

Because the Memorandum is clearly designed to assist the two agencies in their common goal to eliminate employment discrimination; because both agencies have investigative and cooperative powers to attain that goal;[5]

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[5] "Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission . . . shall make an investigation thereof." 42 U.S.C. § 2000e-5(b). See also 42 U.S.C. § 2000e-8(a).

and because it makes "sense" that in the interest of efficiency and the public interest they should share information each has which would assist the other in that attainment, the Court concludes that unless the Memorandum is found violative of some of the provisions of law as urged by plaintiff it should stand.

The first argument is that the Memorandum violates the Federal Reports Act. This act was designed to "prevent unnecessary burden or expense to a citizen" required to make reports to the government, 88 Cong. Rec. 9165 (Nov. 27, 1942) and to eliminate unnecessary duplication of reporting requirements. 77 Cong. 2d Sess. U.S. Code Cong. Service 2084 (1942). These burdens are not what is troubling the plaintiff. It is questionable, indeed, whether the subject matter covered by the Memorandum is within the

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"The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated." Executive Order No. 11246, § 206(a). See also § 202(5) and 206(b) of E.O. 11246.

"The Commission shall have power . . . to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals. . . ." 42 U.S.C. § 2000e-4(g).

"Information obtained . . . shall be used only in connection with the administration of the Order, the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act." 41 C.F.R. § 60-1.43.

". . . [T]he Secretary [of Labor] or the appropriate contracting agency may:

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(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964."

E.O. 11246, § 209(a)(3).

definition of "information" contained in 44 U.S.C. § 3502.[6] Assuming, however, that it is, § 3508(b) must then be examined to see if its terms are met so as to allow interagency disclosure.

It reads as follows:

(b) Information obtained by a Federal agency from a person under this chapter may be released to another Federal agency only—

(1) in the form of statistical totals or summaries; or

(2) if the information as supplied by persons to a Federal agency had not, at the time of collection, been declared by that agency or by a superior authority to be confidential; or

(3) when the persons supplying the information consent to the release of it to a second agency to which the information was originally supplied; or

(4) when the Federal agency to which another Federal agency releases the information has authority to collect the information itself and the authority is supported by legal provision for criminal penalties against persons failing to supply the information.

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[6] § 3502:

"As used in this chapter—

• • •

'information' means facts obtained or solicited by the use of written report forms, application forms, schedules, questionnaires, or other similar methods calling either for answers to identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States or for answers to questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest."

It is conceded by the defendants that the information intended to be disclosed to EEOC pursuant to the Memorandum will not be "in the form of statistical totals or summaries" as allowed by subsection (b)(1).

There has been no declaration at the time of collection, by the collecting agency or by a superior authority, that the information is confidential, so as to fall within subsection (b)(2). Plaintiff argues that the only way it can secure such a declaration is by compliance with 41 C.F.R. § 60-60.4 (d).[7] Plaintiff further asserts that a substantial portion of the documents submitted to DSA are confidential, but the DSA has made no such determination nor has it contested the confidentiality asserted. From this plaintiff concludes that the documents *are* confidential. This regulation controls, by its terms, only *public* access to information. The statute, moreover, requires the agency's *declaration*

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[7] 41 C.F.R. § 60-60.4(d):

"(d) *Public access to information.* Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552, and should specify the reasons why such information is not disclosable. The Contract Compliance Officer will consider the contractor's claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated with a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60-40.2 and 60-40.3 of this chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and such information obtained from a contractor under Subpart B shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review."

of confidentiality. Whatever remedy Reynolds may have to compel such a declaration or a review of the agency's action or inaction, it is clear that the terms of this subsection of the statute have not been presently met.

Subsection (b)(3) allows release of information when the person supplying the information consents. Certainly Reynolds is correct in asserting that it has not explicitly consented to release of its AAP's to EEOC. It is incorrect, however, in saying that it has not implicitly consented. Executive Order 11246 requires, *inter alia*, as terms to any contract with the government, that the contractor obey all rules and regulations promulgated under the Order [8] and that the contractor furnish all information and reports required by the Order and its implementing regulations.[9] An OFCCP regulation, C.F.R. § 60-1.43, note 5 *supra*, states that information will be used in administering Executive Order 11246 *and* the Civil Rights Act of 1964 as amended. Because the OFCCP and its compliance agencies have no enforcement authority under Title VII of that Act, this regulation can only mean that the information is available to Title VII's enforcement authority, EEOC. This interpretation is more persuasive when one is mindful of the duties among agencies to cooperate cited earlier.[10] In short, Reynolds, in contracting with the government, explicitly consented to the information being used to administer Title VII and, thereby, implicitly consented to that information being made available to Title VII's enforcing agency, the EEOC.

The government also argues that subsection (b)(4) is applicable because criminal sanctions may be sought against persons failing to supply information demanded by EEOC.

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[8] E.O. 11246, § 202(4).

[9] E.O. 11246, § 202(5).

[10] See Note 5 and accompanying text, *supra*.

Such a right, at least insofar as the AAP's are concerned, is too indirect to be included within § 3508(b)(4), and the Court does not conclude that that subsection supports the transfer of the information here under consideration.

For reasons stated above, however, the Court does conclude that the Federal Reports Act does not invalidate the exchange of information contemplated by the Memorandum.

The second and, closely related thereto, the seventh, grounds, assert that the Memorandum violates the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* as made applicable to Title VII by § 714(a), 42 U.S.C. § 2000e-12(a). All parties concede that the Memorandum is a rule as defined in § 551(4) and applied in § 553 of the APA. They disagree, however, on the question whether the Memorandum is within particular exceptions, § 553(a)(2) and § 553 (b)(A), to the notice and comment requirements of § 553. In the Court's view whether the Memorandum is within these exceptions depends on whether it is procedural or substantive; more precisely, whether it creates or changes existing rights and obligations. *EEOC* v. *Raymond Metal Products Co.*, —— F.2d ——, No. 75-1007 (4th Cir. January 26, 1976); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972). Paragraphs 1, 2, 8 and 9 of the Memorandum [11] involve only the exchange of information, partially as raw data, partially as agency generated reports. These exchanges do not affect any rights and obligations. The plaintiff argues that such exchanges have a substantial impact on its activities, *Lewis-Mota* v. *Secretary of Labor, supra.* To the extent that the exchanges increase its exposure to liability, Reynolds may subsequently challenge the use of the documents in any eventual litigation. See the Court's consideration of Reynolds' fifth argument *infra.*

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[11] Only ¶¶ 1, 2, 8, 9 and 10 have been implemented as to Reynolds. See Plaintiff's Statement No. 40 as adopted by the Court.

It is clear that the real reason for plaintiff's concern is that it would rather have the information it submits to OFCCP remain in the hands of that more understanding agency than be turned over to the EEOC which is characterized by the plaintiff as having a "more hostile and adversarial nature." Rejection of this as a reason or as "impact" requires no elaboration.

Paragraph 10 of the Memorandum is, however, quite different from the others. Rather than describing EEOC's procedural mechanism, it allows a complaint directed to another agency to initiate EEOC's own procedural mechanism. Unlike the regulation challenged in *Raymond, supra,* Paragraph 10 does not simply prescribe "the methods by which the agency acts." Instead it provides an entirely new device for initiating those methods. In other words, this rule is not simply a new key for starting the engine; rather it provides a way to jump start the engine. Given the backlog of EEOC charges [12] and the exposure to liability after 180 days of the filing,[13] the Court holds that Paragraph 10 creates a substantial impact [14] on Reynolds. Therefore, it is invalid for failure to comply with the notice and comment requirements of 5 U.S.C. § 553.

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[12] Minority Views to House Report on the Equal Employment Opportunity Act of 1972, *U.S. Code Congressional and Administrative News* (1972) at 2173. According to Reynolds' research, EEOC's backlog of unprocessed Title VII charges now exceeds 100,000. Plaintiff's Memorandum at 27, n. 1.

[13] 42 U.S.C. § 2000e-5(f)(1).

[14] Reynolds argues a second type of "substantial impact" (seventh argument). However, rather than describing the Memorandum itself as the final agency action, this argument construes each interagency exchange of information as the "agency action." Such a construction, according to Reynolds, requires some kind of hearing to challenge the exchange. This Court disagrees with Reynolds' bald conclusion that the mere transfer of documents harms Reynolds and constitutes impact. To impose hearing requirements for all such bureaucratic activity would halt virtually all government work.

Because Paragraph 10 is clearly separable from the remainder of the Memorandum, its invalidity does not affect the remainder. *Fowler* v. *Gage*, 301 F.2d 775 (10th Cir. 1962).

A part of Reynolds' second argument concerns § 709(c) of Title VII and its implementing regulations, 29 C.F.R. §§ 1602.1-1602.4. This statutory provision, 42 U.S.C. § 2000e-8(c), states:

> Every employer . . . shall . . . (3) make such reports therefore as the Commission [i.e., EEOC] shall prescribe by regulation or order, after public hearing, as reasonable, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder.

Reynolds objects to the Memorandum because it was not preceded by a public hearing. Section 709(c) is only applicable, however, when EEOC requires reports directly from an employer. Presumably the rationale of the provision is that employers be allowed to comment prior to the imposition of unduly burdensome paperwork requirements. That rationale is irrelevant to the Memorandum, which makes no direct reporting demands on the employer. Therefore, the Memorandum withstands an attack based on § 709(c).

Reynolds fourth ground is that the Memorandum is contrary to the Congressional intent underlying the Equal Employment Opportunity Act of 1972. From the failure of Congress to enact a provision transferring OFCCP's duties to EEOC, Reynolds infers that the Memorandum violates Congressional intent. Such an inference is not, however, well founded. The refusal of Congress to merge OFCCP into EEOC cannot reasonably be interpreted as forbidding all cooperation between the two agencies. The Memorandum's provisions dealing with the exchange of information are surely expressions of cooperation for efficiency that do not violate the Congressional intent manifested in the rejection of the merger provision.

Paragraph 10, however, raises a more serious question concerning a violation of Congressional intent. Given its disposition of this paragraph, the Court need not, however, address the issue in this case, for the agencies may well decide after public comment not to promulgate Paragraph 10.

Reynolds' fifth ground is that the Memorandum violates EEOC information-gathering procedures as defined in § 710, 42 U.S.C. § 2000e-9. That provision adopts the investigatory mechanism of the National Labor Relations Board (NLRB) as explained in 29 U.S.C. § 161. Under these procedures, an employer can deny a request for documents and, by doing so, require the EEOC to issue an administrative subpoena. This subpoena can then be challenged in district court for the relevance and breadth of the documents sought. Reynolds complains that the Memorandum circumvents this method of challenge. Like the reporting requirement of § 709(c), however, this subpoena process is applicable only to documents requested directly from the person being investigated. Only in that circumstance is an employer unduly burdened by the time and expense of producing records. The subpoena process is designed to prevent such burdens. Challenges to interagency exchanges are not based on burdensomeness to the employer but on other evidentiary grounds. An employer can pose such objections, based on relevance and privilege, if and when federal court litigation occurs.[15]

The third and sixth grounds require little discussion. The third seeks to invalidate the Memorandum because it

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[15] The inapplicability of the subpoena process to interagency exchanges of information is apparent after reading 29 U.S.C. § 161(6). Although it is not clear that § 161(6) is specifically incorporated by 42 U.S.C. § 2000e-9, that subsection does show that challenges to subpoena based on relevance or breadth, provided for in § 161(2), do not control interagency exchanges of records.

does not include as parties the members of the Equal Employment Opportunity Coordinating Council. Plaintiff cites no authority for the proposition that the cooperation between the agencies authorized by the various statutes, the Executive Order, and regulations is to be exercised solely through the Council. Nor is the Court willing to imply such a limitation on that cooperation. The sixth ground addresses itself to whether the Memorandum constitutes an interagency reporting requirement within the meaning of the Interagency Reports Management program, 41 C.F.R. § 101-11.1100 *et seq.* It would be an absurdity to invalidate the Memorandum because the GSA requirement that its approval be obtained before data can be transmitted from one agency to another had not been complied with. Moreover the program outlined in the regulation mentioned appears to apply to requirements that one agency gather information for transmission to another agency. There is no such requirement here—the information is submitted to the agencies by the plaintiff without reference to the Memorandum. The Memorandum itself requires persons such as the plaintiff to submit nothing.

For the foregoing reasons summary judgment is awarded the defendants insofar as the declaratory and injunctive relief sought by the plaintiff in connection with Paragraphs 1, 2, 8 and 9 of the Memorandum are concerned; summary judgment is awarded the plaintiff insofar as Paragraph 10 of the Memorandum is concerned; Paragraph 10 is declared to be invalid; a permanent injunction will be awarded plaintiff enjoining defendants, their successors in office, agents, etc., from implementing, insofar as the plaintiff is concerned, Paragraph 10; and it is so ordered.

Counsel for defendants shall prepare a decree embodying, by reference to this Memorandum, the rulings contained herein and awarding the declaratory and injunctive

relief above set forth. The decree should be presented for entry after submission to plaintiff's counsel for approval as to form.

/s/ G. V. B.

United States District Judge

Alexandria, Virginia

July 27th, 1976

APPENDIX I

OFCC-EEOC Memorandum of Understanding

Following is the full text of a memorandum of understanding between the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance. The agreement is designed to speed enforcement of EEO regulations and to improve coordination between the two agencies. It supersedes an earlier agreement and is effective September 11, 1974.

This Memorandum of Understanding between the Office of Federal Contract Compliance and the Equal Employment Opportunity Commission is being implemented to further the objectives of Congress under Section 715 of Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Amendments of 1972. These objectives are to develop and implement agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the parties to this Memorandum.

The parties to this Memorandum agree as follows:

1. The OFCC shall direct the compliance agencies to make available for inspection and copying to the appropriate requesting official of the EEOC or his or her designee any documents pertaining to any respondent against whom a charge has been filed under Title VII of the Civil Rights Act of 1964, including but not limited to affirmative action programs, investigative files, conciliation agreements, compliance review reports, debarment lists, and all supporting data thereto, within ten days of such request, provided such information is available in the files of either the OFCC or the Compliance Agencies.

2. The EEOC shall make available for inspection and copying to the appropriate requesting official of the OFCC or his or her designee any document pertaining to the enforcement of Executive Order 11246, including but not limited to copies of charges, investigative files, Commission Decisions, conciliation agreements, Voluntary Programs data, all pleadings and briefs filed in civil actions brought by the Commission and all supporting data hereto within ten days of such request, provided such information is available in the files of EEOC.

3. "Appropriate Requesting Officials" shall for purpose of the Agreement, be defined as follows:

a. For the Commission:

1. The Chairman
2. The Executive Director
3. The General Counsel
4. Any Regional Attorney
5. Any Regional Director
6. Any District Director

b. For the OFCC/Compliance Agencies:

1. The Secretary or Under Secretary of Labor
2. The Solicitor of Labor
3. The Director or Deputy Director, OFCC
4. Any Associate Assistant Regional Director, OFCC
5. Any Compliance Agency Contract Compliance Officer
6. Any Compliance Agency Regional Director

4. Responses to all requests for information shall be made to the official making such request, or his/her designee.

5. All requests by third parties for disclosure of information shall be referred to the agency which initially compiled or collected the information.

6. The Secretary and the Chairman shall designate appropriate officials who will promptly advise each other of the respondents/contractors subject to the provisions of Executive Order 11246, as amended, who have been selected by each agency for industry-wide or regional compliance and litigation efforts. In the event that the agencies select

identical respondents/contractors these officials shall reach agreement on the division of responsibilities in pursuit of their mutual endeavor(s).

7. (a) The OFCC shall notify and direct the appropriate compliance agency to notify the appropriate EEOC District Director(s) before any matter is noticed for a debarment hearing. The EEOC District Director will then notify OFCC and the appropriate compliance agency of any matters involving systematic discrimination pending before the Commission concerning the contractor in question. To the extent that such issues are consistent with the facts disclosed by the compliance review, these issues shall be included by the compliance agency in the "14 Day Notice of Intent to Debar" and will be diligently prosecuted by the Compliance Agency.

(b) EEOC shall notify the Director of OFCC and the appropriate agency Contract Compliance Officer of cases being considered for litigation against Federal contractors with a summary of the issues and EEOC findings. The agency Contract Compliance Officer will then notify EEOC of any matters involving systematic discrimination pending before the agency concerning the contractor in question. To the extent that such issues are consistent with the facts disclosed by the EEOC investigation, such issues shall be included by EEOC in the complaint filed in Federal District Court and will be diligently prosecuted by EEOC.

8. The parties shall exchange information as follows:

(a) OFCC will provide EEOC regional offices with:

1. Copies of reports from Compliance Agencies outlining contractor compliance reviews proposed for each quarter.

2. A listing of compliance reviews actually completed each quarter indicating the results of such reviews.

(b) EEOC will provide OFCC with:

1. A printout of active/inactive charges within District

Offices. The printout shall contain the following data items:

(a) Charge number
(b) Name of Charging Party
(c) Name of Respondent
(d) Location of Respondent
(e) Bases
(f) Issues
(g) Type Respondent #1
(h) Current Status date and code
(i) Current Status definitions

2. A quarterly list of subsequent new charges received in Headquarters from each District Office.

3. A copy of each conciliation agreement and court settlement involving systematic discrimination by Federal contractors.

9. Prior to the investigation or review of any facility, the appropriate investigative or compliance officials of EEOC, OFCC, or the Compliance Agencies shall notify each other of their pending activity, and shall determine:

(a) Whether the contacted agency has outstanding complaints of discrimination at the facility to be investigated/reviewed. If so, the subject matter of such complaints shall be considered in the review or investigation. Insofar as the complaints involve systemic discrimination, their subject matter will be concluded in any conciliation agreement reached between the employer and the reviewing agency. EEOC complainants will not waive any rights they may have under Title VII as the result of an OFCC or Compliance Agency resolution.

(b) Whether the contacted agency also plans to investigate or review the identical facility. If so, the appropriate officials from each agency shall confer as to the scheduling and coordination of their compliance efforts.

10. Complaints filed with OFCC shall be deemed charges filed with EEOC and OFCC shall promptly transmit such charges to the appropriate EEOC District Office.

11. It is agreed by both agencies that consistent procedures and policies and full interchangeability of compliance determinations are basic to full coordination of their activities. Therefore, it is the intention of the agencies to develop mutually compatible investigative procedures and compliance policies, including minimum standards of remedy. The parties will designate members of a task force to develop such standards, which will commence meetings as soon as possible after the signing of this Memorandum.

12. EEOC and OFCC shall conduct periodic reviews of the implementation of this agreement, and shall, on an ongoing basis, continue their efforts to develop consistent systems, procedures, and standards in furtherance of the purposes of this agreement.

This Memorandum of Understanding supersedes the agreement signed on May 20, 1970.

/s/ John H. Powell, Jr.
Chairman, Equal Employment Opportunity Commission

/s/ Peter J. Brennan,
Secretary, U.S. Department of Labor

/s/ Philip J. Davis,
Director of Federal Contract Compliance

APPENDIX II

10. The information contained in the AAP's and supportive data and documents collected from plaintiff during compliance reviews by defendants Rumsfeld, Vaughan, Usery and Lorber, and their respective agents and employees, would not, as a matter of plaintiff's company policy, be voluntarily furnished by plaintiff to the Equal Employment Opportunity Commission or to any member of the public. [Affidavit of Fred R. Edney (Attachment B to Plaintiff's Statement), ¶ 3].

12. Plaintiff's AAP's and related workforce information have not been furnished by the plaintiff to any persons or government agencies other than OFCCP and its contract compliance agencies.

23. The first EEOC request was for documents to be used in conjunction with the development of Reynolds as a proposed respondent for § 707 action by the EEOC. [Defendants' Answer No. 38(b)].

24. During its review of plaintiff's Sheffield operations, EEOC did not have available to it statistics concerning the job classifications and populations by job classifications for the different departments comprising a production facility. [Deposition of Edward J. Demsey, Esq., p. 32 (attachment E to Plaintiff's Statement)].

25. When EEOC first requested to inspect DSA files concerning the Sheffield operations, the request was not in the context of pending charges. [Demsey Deposition, pp. 27-28].

36. Within the categories of documents covered by the Memorandum of Understanding, there are no categories which OFCCP, DSA or other compliance agencies may not disclose, or in their discretion may refuse to disclose, to EEOC; or which EEOC may not dis-

close, or in its discretion may refuse to disclose, to OFCCP, DSA or other compliance agencies. [Defendants' Admission No. 20].

40. The Court adopts this proposed finding. Its authority is found in Defendants' Answer No. 21, however, not Answer No. 2.

49. Certain Title VII charges filed against plaintiff at the EEOC which plaintiff desires to have promptly investigated and, where appropriate, conciliated have now been pending before the EEOC for as much as three years. [Edney Affidavit, ¶ 7].

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2124

REYNOLDS METALS COMPANY, *Appellant*

versus

DONALD H. RUMSFELD, Secretary, U. S. Department of Defense; W. J. USERY, Secretary, U. S. Department of Labor; LAWRENCE Z. LORBER, Director, Office of Federal Contract Compliance Programs; LT. GENERAL WOODROW W. VAUGHAN, Director, Defense Supply Agency, and EQUAL EMPLOYMENT OPPORTUNITY COMMMISSION, Ethel Bent Walsh, Acting Chairman, *Appellees.*

No. 76-2125

REYNOLDS METALS COMPANY, *Appellee,*

versus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Ethel Bent Walsh, Acting Chairman, *Appellant,*

and

DONALD H. RUMSFELD, Secretary, U. S. Department of Defense; W. J. USERY, Secretary, U. S. Department of Labor; LAWRENCE Z. LORBER, Director, Office of Federal Contract Compliance Programs; LT. GENERAL WOODROW W. VAUGHAN, Director, Defense Supply Agency, *Defendants.*

No. 76-2126

REYNOLDS METALS COMPANY, *Appellee,*

versus

DONALD H. RUMSFELD, Secretary, U. S. Department of Defense; W. J. USERY, Secretary, U. S. Department of

Labor; LAWRENCE Z. LORBER, Director, Office of Federal Contract Compliance Programs; LT. GENERAL WOODROW W. VAUGHAN, Director, Defense Supply Agency, *Appellants,*

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Ethel Bent Walsh, Acting Chairman, *Defendant.*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.

Upon consideration of the petition for rehearing and the motion to stay mandate, along with the opposition to the motion to stay, by counsel,

IT IS ORDERED THAT:

1. the petition for rehearing is denied;
2. the motion for stay of the mandate is granted pending the filing of the petition for a writ of certiorari with the Supreme Court of the United States.

Entered at the direction of Judge Butzner for a panel consisting of Judge Moore, Judge Butzner and Judge Hall.

FOR THE COURT,
/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX D

(1) Administrative Procedure Act § 553. 5 U.S.C. § 553

Sec. 553. Rule making. (a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the

rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(2) National Labor Relations Act § 11(1) and (2), 29 U.S.C. § 161(1) and (2).

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of

witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Civil Rights Act of 1964, Title VII, §§ 709-710, 42 U.S.C. §§ 2000e–8-9.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

Sec. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

• • •

(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

INVESTIGATORY POWERS

Sec. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

[1972 Amendments: Section 710 was amended by P.L. 92-261, effective March 24, 1972, and empowers EEOC to conduct all hearings and investigations under Section 11 of the NLRA.]

(4) E.O. 11246 on Nondiscrimination Under Federal Contracts

Text of Executive Order 11246, signed by President Johnson September 24, 1965, as amended by Executive Order 11375, signed October 13, 1967. Amended Part I, effective November 12, 1967, was superseded by Executive Order 11478.

Part II was amended to add sex as prohibited basis of discrimination, effective October 13, 1968.

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

• • •

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements, for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of Septem-

ber 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided,* however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided,* That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so re-

quire, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided,* That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further,* That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C—Powers and Duties of the Secretary of Labor and the Contracting Agencies

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title

VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D—Sanctions and Penalties

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

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(5) OFCCP Regulations 41 CFR § 60-1.21 through 60-1.24.

SUBPART B—GENERAL ENFORCEMENT; COMPLIANCE REVIEW AND COMPLAINT PROCEDURE

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§ 60-1.21 Filing complaints.

Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the

compliance agency or the Director for good cause shown. (As revised, effective February 17, 1977)

§ 60-1.22 Where to file.

Complaints may be filed with the compliance agency or the OFCCP, 200 Constitution Avenue, N.W., Washington, D.C., 20210. Those filed with the Director may be referred to the compliance agency for processing, or they may be processed by the Director in accordance with § 60-1.24 (As revised, effective February 17, 1977)

§ 60-1.23 Contents of complaint.

(a) The complaint shall include the name, address, and telephone number of the complainant, the name and address of the contractor or subcontractor committing the alleged discrimination, a description of the acts considered to be discriminatory, and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his/her authorized representative. Complaints alleging class-type violations which do not identify the alleged discriminatee or discriminatees will be accepted, provided the other requirements of this paragraph are met.

(b) If a complaint contains incomplete information, the compliance agency or OFCCP shall seek the needed information from the complainant. In the event such information is not furnished to the compliance agency or the Director within 60 days of the date of such request, the case may be closed. (As revised, effective February 17, 1977)

§ 60-1.24 Processing of matters by agencies and the Director.

(a) *Complaints.*—A copy of each complaint filed with the compliance agency shall be transmitted to the Director within 10 days after the receipt thereof. OFCCP and the

compliance agencies may refer appropriate complaints to the Equal Employment Opportunity Commission (EEOC) for processing under Title VII of the Civil Rights Act of 1964, as amended, rather than processing under E.O. 11246 and the regulations in this chapter. Upon referring complaints to the EEOC, compliance agencies or the OFCCP, as appropriate, shall promptly notify complainant(s) and the contractor of such referral.

(b) *Complaint investigations.*—In conducting complaint investigations, OFCCP or the compliance agency shall, as a minimum, conduct a thorough evaluation of the allegations of the complaint and shall be responsible for developing a complete case record. The compliance agency shall follow such other guidance in investigating the complaints as the Director provides. The case record should contain the name, address, and telephone number of each person interviewed, the interview statements, copies, transcripts, or summaries (where appropriate) of pertinent documents, a reference to at least one covered contract, and a narrative report of the investigation with references to exhibits and other evidence which relate to the alleged violations. When a complaint is filed against a prime contractor or subcontractor who has contracts involving more than one agency, unless otherwise provided, the compliance agency shall conduct the investigation and make such findings and determinations as shall be appropriate for the administration of the Order.

(c) *Resolution of matters.*—(1) If the complaint investigation by the compliance agency pursuant to paragraph (b) of this section shows no violation of the equal opportunity clause, the agency shall so inform the Director. The Director may review the findings of the agency, and he/she may request further investigation by the agency or may undertake such investigation as he/she may deem appropriate.

(2) If any complaint investigation or compliance review indicates a violation of the equal opportunity clause, the matter should be resolved by informal means whenever possible. Such informal means may include the holding of a compliance conference by the compliance agency. Each prime contractor and subcontractor shall be advised that the resolution is subject to review by the Director and may be disapproved if he/she determines that such resolution is not sufficient to achieve compliance.

(3) Where any complaint investigation or compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Director or the compliance agency, with the approval of the Director, shall proceed in accordance with § 60-1.26.

(4) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of a compliance agency or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director.

(5) For reasonable cause shown, the Director or a compliance agency may reconsider or cause to be reconsidered any matter on his/her own motion or pursuant to a request.

(d) *Reports to the Director.*—(1)With the exception of complaints which have been referred to EEOC, within 60 days from receipt of a complaint by the compliance agency, or within such additional time as may be allowed by the Director for good cause shown, the compliance agency shall process the complaint and submit to the Director the case record and a summary report containing the following information:

(i) Name and address of the complainant;

(ii) Brief summary of findings, including a statement as to the agency's conclusions regarding the contractor's compliance or noncompliance with the requirements of the equal opportunity clause;

(iii) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed or, whenever appropriate, the recommended corrective action and sanctions or penalties.

(2) A written report of every pre-award compliance review required by this regulation or otherwise required by the Director, including findings, will be forwarded to the Director within 10 days after the award for a postaward review.

(3) A written report of every other compliance review or any other matter processed by the agency involving an apparent violation of the equal opportunity clause shall be submitted to the Director. Such report shall contain a brief summary of the findings, including a statement of conclusions regarding the contractor's compliance or noncompliance with the requirements of the Order, and a statement of the disposition of the case, including any corrective action taken or recommended and any sanctions or penalties imposed or recommended. (As revised, effective February 17, 1977)

(6) OFCC-EEOC Memorandum of Understanding

39 Fed. Reg. 35855 (1974)

For the text of the Memorandum of Understanding, see pp. 28a-32a *supra*.

Supreme Court, U. S.
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No. 77-1097

In the Supreme Court of the United States

OCTOBER TERM, 1977

REYNOLDS METALS COMPANY, PETITIONER,

v.

HAROLD BROWN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 564 F. 2d 663. The opinion of the district court (Pet. App. B) is reported at 417 F. Supp. 365.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1977. A petition for rehearing (Pet. App. C) was denied on December 5, 1977, and the petition for a writ of certiorari was filed on February 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Memorandum of Understanding, by which the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs agreed to share information and coordinate their efforts, constitutes an unlawful cross-delegation of enforcement authority.

2. Whether the Memorandum of Understanding violates limitations on the investigatory authority of the Equal Employment Opportunity Commission.

3. Whether the Memorandum of Understanding is invalid because it was not published for comment before it became effective.

STATEMENT

The Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) are both responsible for enforcing federal prohibitions against employment discrimination, although the mandate of the two agencies is significantly different. The EEOC has enforcement responsibilities under Title VII of the Civil Rights Act of 1964, 78 Stat. 259, as amended 42 U.S.C. (Supp. V) 2000e-5. The Commission endeavors to resolve, through mediation and, if necessary, through litigation, charges of employment discrimination filed by employees or individual Commissioners. The OFCCP, by contrast, is charged with responsibility to enforce Executive Order 11246, as amended, which prohibits federal contractors from engaging in discriminatory employment practices.[1]

[1]The OFCCP has been delegated this responsibility by the Secretary of Labor. The OFCCP in turn delegates certain compliance responsibilities to federal contracting agencies, which are designated as "compliance agencies" for this purpose.

Whereas the EEOC deals with complaints of individuals as well as such systemic discrimination as is reflected in its investigation of particular charges, the OFCCP is primarily concerned with contractors' general employment policies and practices.

Because their spheres of responsibility are related, and in some respects overlapping, the EEOC and the OFCCP have long shared information with respect to discrimination by private employers. Prior to 1970, they shared information on an informal basis. On May 20, 1970, the Commission and the OFCCP formalized these practices in a Memorandum of Understanding that established procedures for the exchange of information between the two agencies. 35 Fed. Reg. 8461.

When Congress amended Title VII in 1972, it expressed the hope that the agencies responsible for eliminating discrimination in employment would be able to coordinate their efforts. Congress cited the 1970 Memorandum of Understanding with apparent approval, although it expressed dissatisfaction with the way it had been implemented. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 15 (1971).

Responding to this concern, the EEOC and the OFCCP executed a new Memorandum of Understanding on September 11, 1974. 39 Fed. Reg. 35855. In pertinent part, the Memorandum provided that the EEOC and the OFCCP would exchange information concerning employers' compliance with laws and regulations forbidding discrimination, and that individual complaints filed with the OFCCP would be deemed filed with the EEOC and would promptly be transmitted by the OFCCP to the appropriate EEOC district office (Pet. App. 3a).

On March 9, 1976, an EEOC Commissioner's charge was filed against petitioner, alleging that the company was engaged in a pattern or practice of discrimination against women and Blacks at its Sheffield, Alabama, facilities. Pursuant to the Memorandum of Understanding, the EEOC subsequently requested information relating to petitioner's employment practices at that plant from the Defense Supply Agency (DSA), which was acting as a "compliance agency" for the OFCCP (C.A. App. 128-129).

After petitioner was informed about this request for information, petitioner filed suit in the United States District Court for the Eastern District of Virginia to enjoin DSA from complying with the request. Petitioner alleged that the Memorandum of Understanding was unlawful, and that any actions taken under the authority of that memorandum were improper and in violation of its rights (Pet. App. 13a-15a).

On cross-motions for summary judgment, the district court upheld the provisions of paragraphs one through nine of the Memorandum, which concerned the sharing of information and cooperation between the agencies. The court, however, ruled that paragraph 10 of the Memorandum, which provided for the transfer of complaints from the OFCCP to the EEOC, should have been promulgated only after satisfying the notice and comment requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. Accordingly, the district court enjoined the agencies from following the policy set out in paragraph 10 (Pet. App. 26a). The court of appeals held the Memorandum valid against all challenges, affirming the portions of the district court's judgment that upheld paragraphs one through nine of the Memorandum and reversing the portion that held paragraph 10 unlawful.

The court of appeals ruled that cooperation among the agencies was permissible and that paragraph 10 violated neither Title VII nor the Administrative Procedure Act (Pet. App. 1a-12a).

ARGUMENT

1. Petitioner first contends (Pet. 8-11) that the Memorandum of Understanding constitutes an impermissible cross-delegation of investigative, prosecutorial, and administrative responsibilities between the OFCCP and EEOC. We disagree.

Contrary to petitioner's suggestion, the EEOC has not assumed enforcement of the Executive Order nor has the OFCCP assumed enforcement of Title VII. Just the opposite, the OFCCP entered into the Memorandum of Understanding in part so that individual claims of discrimination that were more properly cognizable under Title VII than under the Executive Order could be passed on to the EEOC, the agency charged with responsibility for enforcing that statute. Rather than erecting an impermissible system of cross-delegation of authority, the Memorandum of Understanding simply permits the two agencies to cooperate and to coordinate their efforts so as to avoid duplication.[2]

Paragraph nine of the Memorandum, to which petitioner objects, provides that the OFCCP and the EEOC will notify each other before investigating pending charges to determine whether the other agency has outstanding charges against the same respondent. If so, the two agencies will coordinate their investigative efforts,

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[2]Both the EEOC and the OFCCP are specifically authorized to cooperate with other agencies. See 42 U.S.C. (and Supp. V) 2000e-4(g)(1); Executive Order 11246, Sections 207, 209(a); *cf.* 41 C.F.R. 60-1.43.

and if systemtic discrimination is alleged, joint conciliation will be attempted. Through this provision, the two agencies have sought to avoid the waste and confusion of conciliating the same claim twice, once under the terms of Title VII and again under the provisions of Executive Order 11246. The Memorandum in no way alters the EEOC's statutory responsibility for enforcing Title VII or the OFCCP's responsibility for enforcing the Executive Order.

Paragraph seven of the Memorandum also provides for coordinated enforcement efforts between the agencies. Under that paragraph, if the OFCCP begins debarment proceedings against a contractor, it will include in the proceeding any charges of systemic discrimination relevant to that proceeding that may have been filed against that contractor with the EEOC. Similarly, if the EEOC commences litigation against a government contractor, paragraph seven provides that the agency will include matters relevant to the Title VII charge that may have been presented to the OFCCP or one of its compliance agencies. Again, the paragraph does not in any way effect a transfer of enforcement authority from one agency to the other. The OFCCP retains the authority to enforce the Executive Order, by considering charges brought to its attention, including relevant information received from the EEOC, while the EEOC retains similar enforcement authority with respect to Title VII charges, by considering information developed in its own investigations as well as relevant information provided by the OFCCP.

Paragraph 10 of the memorandum similarly does not operate as a "cross-delegation," device, but simply provides that OFCCP will receive and transmit misdirected individual complaints to the EEOC. Because of its focus on eliminating systemic discrimination, the

OFCCP is not well suited to investigate and resolve isolated charges of discriminatory action. The sanctions available to the OFCCP through the Executive Order—terminating a contract or prohibiting a contractor from bidding on future government contracts—reflect the systemic nature of the OFCCP's concerns and its unsuitability for remedying isolated instances of discrimination. Indeed, the Executive Order itself contemplates that the OFCCP will cooperate with the EEOC and the Justice Department in recommending that Title VII proceedings be instituted in appropriate cases. Executive Order 11246, Section 209(a)(3). See also, Section 207. Accordingly, OFCCP's agreement to forward individual complaints to the EEOC does not constitute an abandonment of administrative responsibility, but rather a proper recognition of differences in function of two agencies in a closely related sphere of concern.[3]

2. Petitioner next argues (Pet. 11-16) that the Memorandum of Understanding allows the EEOC to avoid statutory restrictions on its investigative powers. Specifically, petitioner contends that the Memorandum allows the EEOC to secure information that it could not subpoena directly from the company because of limitations on the agency's subpoena powers in Sections 709 and 710 of Title VII, 42 U.S.C. (and Supp. V) 2000e-8 and 2000e-9. Both the court of appeals and the district court rejected this claim, noting that when the EEOC investigates a charge, it is not limited to gathering

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[3]The provision that a complaint filed with the OFCCP is deemed filed with the EEOC at that time has been judicially approved. See *Egelston* v. *State University College at Geneseo*, 535 F. 2d 752, 755 n. 4 (C.A. 2); *Equal Employment Opportunity Commission* v. *Collator Co.*, 7 F.E.P. Cas. 1258 (C.A. 9), reversing 7 F.E.P. Cas. 934 (W.D. Wash.).

information only from the respondent (Pet. App. 5a, 25a). Any restrictions imposed on the EEOC's information-gathering authority by Section 709(a) or Section 710 apply only to the agency's power to compel production, not to information volunteered by other agencies, by third parties, or even by respondents.

Petitioner also attacks the Memorandum on the ground that it allows the Commission to circumvent Section 709(c) of Title VII, 42 U.S.C. (and Supp. V) 2000e-8(c), which requires the EEOC to hold public hearings before imposing new reporting requirements on employers. As both courts below noted, however, the Memorandum does not impose any new reporting requirement at all. It merely gives effect to the OFCCP's regulations, which have long provided that material obtained by that agency from contractors can be used in Title VII enforcement actions (Pet. App. 5a, 24a). 41 C.F.R. 60-1.7, 60-1.43.

3. Finally, petitioner contends that the Memorandum of Understanding should have been promulgated, if at all, only after first being published for notice and comment in accordance with 5 U.S.C. 553(a).[4] That Section of the Administrative Procedure Act, however, applies only to rules or regulations having a substantive impact on outside parties, not to mere statements of agency policy or procedure. *Pickus* v. *United States Board of Parole,* 507 F. 2d 1107, 1112 (C.A.D.C.); *Texaco, Inc.* v. *Federal Power Commission,* 412 F. 2d 740, 744 (C.A. 3); *Carpenters 46 County Conference Board* v. *Construction Industry Stablization Committee,* 393 F. Supp. 480, 493 (N.D. Cal.). As the court of appeals properly

[4]The Memorandum was treated as a rule within the meaning of 5 U.S.C. 551(4) and was published in the Federal Register in accordance with 5 U.S.C. 552(1).

concluded, the Memorandum of Understanding did not have a substantive impact on the rights and duties of employers in general or of petitioner in particular. It was therefore not a substantive rule and accordingly not subject to the notice and comment requirements of 5 U.S.C. 553(a). See *Equal Employment Opportunity Commission* v. *Raymond Metal Products Co.,* 530 F. 2d 590 (C.A. 4).

Paragraph 10 was the only portion of the Memorandum that the district court concluded has a sufficient impact on petitioner to be deemed a substantive rule, and the court of appeals concluded that even that paragraph has no substantive impact on petitioner because it neither diminishes nor increases the company's rights and duties under the Executive Order or Title VII, but "simply provides an expeditious means of transmitting to the commission complaints that should have been mailed to it in the first place" (Pet. App. 10a-11a). In any event, the question of the propriety of paragraph 10 under the Administrative Procedure Act is of no continuing importance since, after the district court's decision, the OFCCP issued regulations permitting it to transmit appropriate complaints to the EEOC. 42 Fed. Reg. 3454. Those regulations were issued in full compliance with the requirements of 5 U.S.C. 553.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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